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No. 684

Supreme Court of the United States

OCTOBER TERM, 1948

EULA WOLFE, *nee* PERRY, SALINA SCOTT, LENA McLANE, now CLARK, and MARY WALKER, *nee* SCOTT,
Petitioners,

VERSUS

OREN PHILLIPS and JANIE PHILLIPS, his wife, HARRY H. DIAMOND, INCORPORATED, a corporation, WALTER MAYER and BRUNO MAYER,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION

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April, 1949.

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINION BELOW

The District Court did not write an opinion. Its Findings of Fact and Conclusions of Law appear in the Transcript at pages 70-79. The opinion of the Court of Appeals for the Tenth Circuit appears in the Transcript at pages 86-95.

STATEMENT OF THE CASE

The Respondents adopt as their statement of facts the statement of the Petitioners appearing at pages 4-7 of the Brief.

Respondents desire to point out, however, that the claim of the Mayers to an undivided one-sixth (1/6) interest in the minerals is not founded solely upon a Deed

executed in their favor by one of the Petitioners. The exact claim of the Mayers is recited in the opinion of the Court of Appeals for the Tenth Circuit at Appendix V of the Brief of the Petitioners.

ARGUMENT

First Proposition.

The Court of Appeals did not err in holding Petitioners' cause of action was barred by the applicable statute of the State of Oklahoma.

This is the converse of Petitioners' First Proposition.

Effective March 30, 1945, the Legislature of the State of Oklahoma enacted the following statute:

> "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued, and at no time thereafter;
>
> "(1) An action for the recovery of real property sold on execution or for the recovery of real estate partitioned by judgment in kind, or sold, or conveyed pursuant to partition proceedings, or other judicial sale, when brought by, or on behalf of, the execution debtor or former owner or his or their heirs, or any person claiming under him or them by title acquired after the date of the judgment within five (5) years after the date of the recording of the deed made in pursuance of the sale or proceeding, or within five (5) years after the date of the entry of the final judgment of partition in kind where no sale is had in the partition proceedings; provided, however, that where any such action pertains to real estate sold, conveyed

or partitioned by judgment, pursuant to partition proceedings, or other judicial sale, and would at the passage of this Act be barred by the terms hereof, such action may be brought within one (1) year after the passage of this act;"

(a). Petitioners first contend the Act of April 12, 1926 (44 Stat. 239), applied the Statutes of Limitations of the State of Oklahoma then in force and that the Congress did not thereby consent that future revisions by State Statutory Enactment should apply to restricted Indians.

We think the Act of Congress of April 12, 1926, clearly evinces an intent to apply the local law of limitation of action, as revised or modified, to restricted Indians.

The statute provides:

> "The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to * * * all rights and causes of action heretofore accrued or hereafter accruing to any such Indians or their heirs or grantees, *to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma.*"

Upon no other ground may the employment of the italicized phrase be explained than upon the premise the Congress intended for restricted Indians to be subjected to the same Statutes of Limitations as other citizens of the State of Oklahoma.

Now, the constitutional power of a state to modify its statutory enactments pertaining to limitations of actions had been recognized as established law many years prior to the Congressional Act. *Atchafalaya Land Co.* v. *F. B.*

Williams Cypress Co., 258 U. S. 190, 42 Sup. Ct. 284 (1922); *Koshkonong* v. *Burton*, 104 U. S. 668, 26 L. Ed. 886 (1881); 34 Am. Jur. 33.

Since the Act expressly provided the Statutes of Limitations of the State of Oklahoma should apply to restricted Indians, their heirs and grantees, to the same extent and in the same manner as to other citizens of the State, and since the power to modify those enactments was inherent in the State of Oklahoma at the time of the passage of the Act of April 12, 1926, the conclusion that Congress contemplated Amendatory Acts of the State Legislature should be equally applicable appears to be inescapable.

The contrary intent might have been achieved easily by inserting after the words "State of Oklahoma" the phrase "now in force and effect" or other similar terms. This very omission argues that no such intent was contemplated.

The same argument was presented to the Supreme Court of Oklahoma in *Sockey* v. *Ellis*, 112 Okla. 116, 240 Pac. 87 (1925). The Court *held*:

> "The provision of section 9, Act of Congress May 27, 1908, that the lands of deceased members of the Five Civilized Tribes of one-half or more Indian blood should 'descend to the heirs according to the law of descent and distribution of the state of Oklahoma,' is a general reference, and means the law of the state, as amended or revised, and as it exists from time to time, or at the time the exigency arises to which the law is to be applied."

We conclude the Act of April 12, 1926, evidenced an intent to apply the Statute of Limitations of the State of

Oklahoma to restricted Indians, their heirs and grantees, in the same manner and to the same extent as to other citizens of the State, that in applying the local law the Congress must have contemplated the right of the State to change that law.

(b). It is further contended that if the Act of April 12, 1926, be construed to subject restricted Indians to the Amendatory Act of the Oklahoma Legislature, the federal legislation is an unconstitutional delegation of the legislative power of the Congress (Petitioners' Br. 21).

This argument stems from the premise that the Congress, in consenting to the application of the Oklahoma law to restricted Indians, in effect, adopted the local law as federal legislation. It is then said the Congress may not delegate to the State Legislature the power to modify that law.

The force of the argument depends upon the validity of the assertion that the effect of the Act of April 12, 1926, if so construed, would be to vest in the Legislative Body of Oklahoma the power to enact federal legislation.

It is our contention that the Act does not bear such a construction. It is nothing more than a consent by the Federal Government that the Statutes of Limitation of the State of Oklahoma, as modified and revised, shall be applicable to the restricted lands of restricted Indians.

In *Stewart* v. *Keyes*, 295 U. S. 403, 55 Sup. Ct. 807 (1935), this Court considered the effect of a comparable statute. There, the Court, speaking through MR. JUSTICE VAN DEVANTER, said:

"When Congress subjected Indian minors and incompetents and their estates to the laws of the state in respect of guardianships, it *did not thereby incorporate those laws into the federal restrictions. It merely gave its assent to their application to such Indian. The laws remained state laws, as before, and as such were* a limitation fixing stated ages of majority for them. This, of course, put that matter beyond the reach of the state statutes, and the courts of the state have so ruled. Apart from this limitation and some others not material here, the state laws have the same application to Indian guardianships that they have when the wards are minors or incompetents of other races.

"Whether the proceedings in such Indian guardianships *conform to the state statutes is a question of state, not federal, law.* And, in the absence of congressional provision to the contrary, the time and mode of seeking the correction of errors believed to have been committed by the state courts in such proceedings, as also the effect of inaction in that regard, are all controlled by the state laws, as in the instance of other guardianship proceedings" (Emphasis ours).

A similar conclusion was reached by the Court of Appeals for the Tenth Circuit in *Jackson* v. *Harris*, 43 Fed. (2d) 516 (C. C. A., 10th, 1930), wherein the Act of May 27, 1908, was considered.

Inasmuch as the Act of April 12, 1926, did not adopt the Statutes of Oklahoma as a part of the federal law, the position that the legislation is an invalid attempt to delegate power appears to be untenable.

Federal legislation providing applicability of local law to restricted Indians is historic. The Act of May 27, 1908, recited the laws of devolution of Oklahoma should control

inheritance. The Act of June 14, 1918 (40 Stat. 606), provided for determination of heirship "in the manner provided by the laws of said State for the determination of heirship in closing up the estate of deceased persons * * * ." The same Act allowed partition of restricted land stating, "The lands of full blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma providing for the partition of real estate."

Many of the Oklahoma Statutes in force at the time of the cited Congressional Acts have been amended. In addition to the example cited at length, the law of Oklahoma pertaining to inheritance through adopted children, was amended in 1945, 10 Okla. Stat. Ann., Sec. 53; in 1915, a bill was enacted prohibiting inheritance by one convicted of having taken the death of the person under whom the inheritance is claimed, 84 Okla. Stat. Ann., Sec. 231; in 1941, the section making the surviving spouse a forced heir was amended, 84 Okla. Stat. Ann., Sec. 44, and the provision relating to notice in action for determination of heirships was modified the same year, 84 Okla. Stat. Ann., Sec. 260.

None of the amendments purports to exclude restricted Indians from its operation.

If the Petitioners are correct in their contention that the Act of April 12, 1926, is invalid as an unconstitutional delegation of Congressional authority, and *a fortiori*, the amended Statute of Limitations of the State of Oklahoma is inapplicable to the restricted lands of restricted Indians by wont of congressional authority, it follows that all

Amendatory Acts of the State Legislature to which reference has been made are equally inapplicable by absence of federal approval.

The answer to Petitioners' contention is that power of the Federal Government in dealing with its Indian wards is plenary. It may say what laws shall govern. It may provide, remove or reimpose restrictions as it sees fit. *Welch* v. *First Trust & Savings Bank*, 15 Fed. (2d) 184 (C. C. A., 8th Cir., 1926); *State of Oklahoma ex rel. Comm'rs of Land Office* v. *United States*, 155 Fed. (2d) 496 (C. C. A., 10th Cir., 1946); *Murray* v. *Ned*, 135 Fed. (2d) 407 (C. C. A., 10th Cir., 1943); *cert. den.* 320 U. S. 781, 64 Sup. Ct. 188, 88 L. Ed. 469.

If the Government may remove all restrictions by Legislative Act and thus subject restricted Indians to the sum of the present and future Enactments of the Legislature of Oklahoma, upon what ground may the application of the present and future enactments of the State Legislature pertaining to limitations of actions be denied or questioned? As JUDGE RICE said in *Frazier* v. *Goddard*, 63 Fed. Supp. 696 (D. C. E. D. Okla., 1945): "The Constitution does not guarantee to an Indian the right to have his land remain restricted."

We conclude the Congress has the plenary power to provide the Statutory Enactments of the State of Oklahoma in force, or as thereafter modified, shall apply to restricted Indians and that its action does not constitute an adoption of local enactments as federal law and, hence, is not a delegation of legislative authority.

Nor are the authorities cited by Petitioners contrary to the conclusion. In both *United States* v. *Paul*, 6 Peters

141, 8 L. Ed. 348, and *Hollister* v. *United States*, 145 Fed. (2d) 773 (C. C. A., 8th, 1906), the issue involves whether or not certain penal statutes were adopted as laws of the United States, the Statutes being enacted subsequent to the adopting Act of Congress. In those cases, the question was: What is the Federal Law? Here, the question is: May the restricted lands owned by restricted Indians be subjected to the laws of Oklahoma by Congressional consent? We submit the cases cited are not pertinent to that issue.

(c). It is further urged the Act of April 12, 1926, was intended to apply to the Statutes then in force and effect for "it cannot be presumed * * * Congress attempted to delegate to the Oklahoma Legislature the power to pass laws in the future which would cut off rights of action by the United States or by restricted Indians in cases where the United States could sue for them" (Petitioners' Br. 19-20).

The effect of the Amendatory Act of 1945 upon the Government's right to intervene in behalf of restricted Indians is not here presented.

Pursuant to the Act of Congress of April 12, 1926, notice of the pendency of this action was served upon the Superintendent of the Five Civilized Tribes (R. 22-23). The Government filed its petition for removal and order of removal followed (R. 25-27). Thereafter, the Government filed its complaint in intervention (R. 28-32). After the case was at issue, the United States filed a request for permission to withdraw its complaint in intervention and order permitting withdrawal was entered (R. 44). The United States did not appear in the trial of the cause and has not appealed from the judgment therein rendered.

The Government is bound by its act in intervening in the action and permitting judgment to be rendered against it. Such was the purpose of Section 3 of the Act of April 12, 1926. *United States* v. *Thompson*, 128 Fed. (2d) 173 (C. C. A., 10th, 1942); *House* v. *United States*, 144 Fed. (2d) 555 (C. C. A., 10th, 1944).

Whether or not the Government was barred by the 1945 Act was not and is not an issue in this case. Suffice it to say, the Government made no contention to the contrary.

We do not deem it necessary to present argument on a point not imperative to the decision in this cause in answer to a contention made by parties whose rights are unaffected by its determination.

In passing, however, we deem it appropriate to observe that the right of the Federal Government to intervene is derived from its own Legislative Enactments, and, therefore, the right so asserted might be wholly denied by a simple repeal of the Legislation establishing the right. If the Federal Government may withdraw its power of intervention *in toto*, we fail to see any constitutional objection to Congressional consent that such rights of intervention be subjected to the applicable limitation statutes of the State of Oklahoma. In brief, we feel the Federal Government, as guardian of the restricted Indian and his lands, may consent that its power of intervention on his behalf be limited in the same manner as the ward.

Second Proposition

The Court of Appeals did not err in holding the judgment in partition and the Sheriff's Deed executed pursuant thereto to be void.

This is the converse of Petitioners' Second Proposition.

Since the decision of the Court of Appeals was based upon the statutory bar of limitations, we do not think the Court was compelled to pass on issues not necessary to its conclusion. Inasmuch as the point is here urged, however, we think it incumbent upon us to present the contention that no error was committed in failing to so hold.

Petitioners now contend, contrary to their position in the District Court and before the Circuit Court of Appeals, that they are restricted Indians under the provisions of the Act of Congress of January 27, 1933 (Petitioners' Br. 12).

In support of their contention that the District Court of Pontotoc County was without jurisdiction to enter a Decree of Partition during the pendency of the probate proceedings in the County Court, Petitioners cite *State ex rel. Morrell* v. *Worten*, 161 Okla. 130, 17 Pac. (2d) 424 (1932), *Simms* v. *Hendricks*, 172 Okla. 532, 45 Pac. (2d) 746 (1937).

In these cases the lands involved were unrestricted. Here, the lands are restricted and are not subject to administration by the County Court of Oklahoma.

The distinction between the powers which a District Court may exercise in dealing with restricted lands, as

compared to unrestricted lands, wherein administration proceedings have been commenced in the County Court involving those lands, was observed by the Supreme Court of Oklahoma in *March* v. *Peter*, 179 Okla. 207, 64 Pac. (2d) 912 (1937). The Court, speaking through MR. JUSTICE BUSBY, said:

> "Our attention has been directed to the cases of *State ex rel. Morrell* v. *Worten*, 161 Okl. 130, 17 P. (2d) 424, and *Simms* v. *Hendricks et al.*, 172 Okl. 532, 45 P. (2d) 746. It is asserted that under these decisions the fact that an administration proceeding is pending in the county court of the state precludes the district court from exercising jurisdiction in suits such as this involving a controversy over lands of the deceased. The cited cases do not justify this broad assertion. The case of *Simms* v. *Hendricks et al., supra*, denies the power of the district court to partition realty of a decedent over which the county court has jurisdiction in connection with the settlement of an estate. The case of *State ex rel.* v. *Worten, supra*, involves the same problem with the additional element that the property belonged to a deceased Osage Indian. In both of the cited cases the county court had acquired jurisdiction over the subject-matter, that is, the property sought to be partitioned by the district court. In the case of *State ex rel.* v. *Worten*, that jurisdiction was vested by the Act of Congress of April 18, 1912 (section 3 (37 Stat. 86)), which was therein quoted and which provided:
>
> " 'That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma.'

"In the case of *Simms* v. *Hendricks et al., supra,* the property involved was treated as being within the jurisdiction of the county court as such. Although the land was originally allotted Indian land, no question as to the restricted character thereof was therein discussed and the land was treated as having fallen within the jurisdiction of the county court which had power to administer upon the estate of the deceased. The facts concerning the quantum of Indian blood and age of the interested parties in that case are not sufficiently disclosed on the face of the opinion to determine the restricted or nonrestricted character of the land involved. However, it may fairly be assumed that the land was unrestricted.

"Aside from the character of the action, which, in each of those cases, was partition, as distinguished from a suit to cancel instruments and quiet title which is the nature of the action presented in the case at bar, there is a very fundamental distinction between those cases and the case we are now considering. That distinction lies in the nature of the power being exercised by the county court with reference to the property involved. *In this case we are dealing with restricted Indian lands which do not constitute assets in the hands of the administrator and are not subject to the jurisdiction of the county court as a judicial body.* See *Wolf* v. *Gills et al.*, 96 Okl. 6, 219 P. 350; *Cowokochee* v. *Chapman*, 90 Okl. 121, 215 P. 759; *Bilby et al.* v. *Noble et al.*, 106 Okl. 302, 234 P. 198" (Emphasis ours).

Here, the lands are admittedly restricted. Since the lands were not assets in the hands of the administrator nor subject to the jurisdiction of the County Court, there was no conflict of jurisdiction created by the District Court of Pontotoc County in assuming jurisdiction over the lands in the partition proceedings.

Third Proposition.

The petition for writ of certiorari does not meet the requirements of Rule 38: (28 U. S. C. A., Sec. 354).

Section 5 of Rule 38 recited in part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> * * * * * * * *
>
> "(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

(1). Petitioners' Brief does not cite a conflicting decision of another Circuit Court of Appeals on the same matter.

(2). The issue decided does not conflict with applicable local decisions, rather the decision of the Court of Appeals is sustained by local decisions: *Sockey* v. *Ellis*, *supra*.

(3). While the instant question has not been decided by this Court, a similar enactment has been construed in harmony with the decision of the Court of Appeals: *Stewart* v. *Keyes, supra.*

(4). The decision of the Court of Appeals is not in conflict with applicable decisions of this Court.

(5). The opinion of the Court of Appeals is not a departure from the accepted and usual course of judicial proceedings: *Sockey* v. *Ellis, supra; Jackson* v. *Harris, supra; Stewart* v. *Keyes, supra.*

We submit the Petition does not meet the tests for granting the Writ prayed.

CONCLUSION

We submit that the Petitioners have shown no proper reason why the writ of certiorari should be granted in this case. In the case of *Magnum Import Co., Inc.*, v. *Cody*, 262 U. S. 159, 43 Sup. Ct. 531, 67 L. Ed. 922, this Court said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, *first* to secure uniformity of decisions between those courts in the nine circuits, and *second*, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ."

It appears to us that this case falls within the eighty per cent above referred to, and we respectfully urge that the writ of certiorari be denied.

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